Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

United States Supreme Court

OCTOBER TERM, 1978

No. 78-1060

EDWARD L. NELSON
Plaintiff-*Respondent*,
vs.
THE GREAT WESTERN
SUGAR CO.,
a
Delaware corporation,
Defendant-*Petitioner*.

PETITION FOR WRIT OF CERTIORARI

PETER J. ADOLPH
Attorney for Defendant-Petitioner
P.O. Box 5308, T.A.
Denver, Colorado 80217
303-893-4600

TABLE OF CONTENTS

Official and Unofficial Reports 1
Jurisdictional Grounds 1
Question Presented for Review 1
Statement of Case 1
Argument 1
Counsel of Record 2
Certificate of Service 3
Appendix —
Opinion, United States District Court, District of Colorado, Reported at 440 F.Supp. 928 . . . . . A1
Judgment, United States Court of Appeals, Tenth Circuit A5

CITATIONS

CASES

Bracken v. S.E.C., 299 U.S. 504 (1936) 2
Brotherhood of Locomotive Firemen & Enginemen v. Toledo, P. & W. R. Co., 332 U.S. 748 (1947) 2
Hodges v. Tulsa County Election Board, 335 U.S. 889 (1948) 2
Leader v. Apex Hosiery Co., 302 U.S. 656 (1937) 2
Montgomery Ward & Co. v. United States, 326 U.S. 690 (1945) 2
Retail Food Clerks & Managers Union v. Union Premier Food Stores, 308 U.S. 526 (1940) . . . 2
S.E.C. v. Engineers Public Service Co., 332 U.S. 788 (1947) 2
S.E.C. v. Philadelphia Co., 337 U.S. 901 (1949) 2
United States v. Munsingwear, 340 U.S. 36 (1950) 2
Woodring v. Clarksburg-Columbus Short Route Bridge Co., 302 U.S. 658 (1937) 2

STATUTES

28 U.S.C. § 1254 (1970) 1
29 U.S.C. § 185(a) (1970) 1

I. OFFICIAL AND UNOFFICIAL REPORTS.

a. The opinion of the United States District Court for the District of Colorado, decided October 13, 1977, is reported at 440 F.Supp. 928, and a copy is appended hereto as Appendix A1

b. The opinion of the United States Tenth Circuit Court of Appeals, issued on August 22, 1978, is not yet reported. A copy of such opinion is appended hereto as Appendix A5

II. JURISDICTIONAL GROUNDS.

a. The date of the judgment sought to be reviewed is August 22, 1978.

b. 28 U.S.C. § 1254 confers jurisdiction upon this Court to review the judgment in question.

III. QUESTION PRESENTED FOR REVIEW.

The sole question presented for review is whether when a case becomes moot on its way to the United States Court of Appeals, that court acts properly in dismissing the case without vacating the trial court's judgment.

IV. STATEMENT OF THE CASE.

Respondent Nelson initiated this action in April 1977 seeking, pursuant to § 301 (a) of the Labor-Management Relations Act of 1947, *as amended*, 29 U.S.C. § 185 (a), arbitration of his discharge by Petitioner, The Great Western Sugar Co. (GWS). The trial court ordered arbitration of such question and GWS appealed and requested a Stay of Execution pending the outcome of the arbitration proceedings. Stay was denied and arbitration was held in March 1978 at which time GWS's position was upheld. GWS then sought to continue with the appeal and Nelson filed a Suggestion of Mootness with the Tenth Circuit asking that the matter be declared moot and that the judgment of the district court be vacated. On August 22, 1978, the Tenth Circuit dismissed the case as moot, but instead of vacating the judgment of the court below, allowed such judgment to stand.

V. ARGUMENT.

The proper course of action for the Court of Appeals in this case was to vacate the judgment of the court below, so that such published opinion would have no precedental value. "The established practice of the Court in dealing with a civil case from a court in the Federal system which has become moot

while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear,* 340 U.S. 36, 39 (1950). This action is commonly used in this situation "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences". 340 U.S. at 41. *See also S.E.C. v. Philadelphia Co.*, 337 U.S. 901 (1949); *Hodge v. Tulsa County Election Board,* 335 U.S. 889 (1948); *S.E.C. v. Engineers Public Service Co.*, 332 U.S. 788 (1947); *Brotherhood of Locomotive Firemen & Enginemen v. Toledo, P. & W. R. Co.*, 332 U.S. 748 (1947); *Montgomery Ward & Co. v. United States,* 326 U.S. 690 (1945); *Retail Food Clerks & Managers Union v. Union Premier Food Stores,* 308 U.S. 526 (1940); *Woodring v. Clarksburg-Columbus Short Route Bridge Co.*, 302 U.S. 658 (1937); *Leader v. Apex Hosiery Co.*, 302 U.S. 656 (1937); *Bracken v. S.E.C.*, 299 U.S. 504 (1936).

The action of the Court of Appeals in this matter was plain error and its order of August 22, 1978, should be reversed and an order should be issued to the United States District Court of the District of Colorado to vacate its opinion entered in this matter.

VI. COUNSEL OF RECORD.

James R. Benson, Jr.
Co-counsel for Defendant-Petitioner
6405 E. Ponderosa Drive #5
Parker, Colorado 80134
303-841-4213

Peter J. Adolph
Co-counsel for Defendant-Petitioner
P.O. Box 5308, T.A.
Denver, Colorado 80217
303-893-4600

Clay R. Smith
Counsel for Plaintiff-Respondent
McKendree & Lubin
1244 Grant Street
Denver, Colorado 80203
303-861-8906

VII. CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that the foregoing petition has been mailed to opposing counsel duly addressed to their office, with proper postage affixed thereto, this 18th day of December 1978.

Peter J. Adolph
P.O. Box 5308, T.A.
Denver, Colorado 80217
Attorney for Petitioner

440 FEDERAL SUPPLEMENT 928

Edward L. NELSON, Plaintiff,
v.
The GREAT WESTERN SUGAR COMPANY,
a Delaware Corporation, Defendant.

Civ. A. No. 77-A-398.

United States District Court, D. Colorado.

Oct. 13, 1977.

A discharged employee and union member brought an action against his former employer to compel it to proceed to arbitration of his discharge. The District Court, Arraj, J., held that the employer's defense of laches was subject to referral to the arbitrator.

Defendant ordered to proceed to arbitration of discharge.

Labor Relations 434.2

Issue of whether discharged union member was guilty of laches in failing to comply with time limits for grievances set forth by collective bargaining agreement was one for arbitration under provisions of that agreement, not for determination by court. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

McKendree & Lubin, by Clay R. Smith, Denver, Colo., for plaintiff.

James R. Benson, Jr., Denver, Colo. for defendant.

MEMORANDUM OPINION AND ORDER

ARRAJ, District Judge.

Plaintiff brings this action under 29 U.S.C. § 185 to compel the defendant to proceed to arbitration of his discharge from defendant's employ. Defendant moved for summary judgment on its defense of laches, and a hearing on that issue was held on August 19, 1977. At that time the court informed the parties that it would consider the matter as if cross motions for summary judgment had been filed. The court invited the parties to submit any additional issues of fact material to such

motions. Defendant filed an affidavit, which the court has considered together with the briefs and arguments of the parties.

I

Plaintiff was discharged on September 2, 1976, after working at Great Western's Ovid Colorado plant for sixteen years. On August 22, 1976 plaintiff had informed his supervisor that he would be gone for a few days in order to seek medical treatment for an arthritic condition. Defendant viewed the absence as unexcused and discharged plaintiff. Plaintiff learned of his termination on September 7, 1976; on the following day his attorney wrote defendant protesting the discharge. Defendant responded by advising plaintiff that he should have filed his complaint with his union within the time limits of the controlling collective bargaining agreement. Plaintiff made a formal request for arbitration of his discharge on April 3, 1977; defendant denied the request on April 11, 1977.

Defendant argues that the alleged failure of plaintiff to comply with the time limits set forth by the collective bargaining agreement constitutes laches, and should preclude plaintiff from obtaining arbitration of his discharge. Plaintiff contends that (1) the September 8, 1976 letter was a timely grievance within the terms of the collective bargaining agreement, and (2) whatever the merits of defendant's laches defense, it should be passed on by the arbitrator rather than by this court.

Since there is no question that the underlying dispute (the justness of plaintiff's discharge) is a proper subject for arbitration, the only issue before the court is whether the defense of laches should be considered by the court or referred to the arbitrator.

II

The answer to this question begins with *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). There the employer argued, *inter alia*, that it was not obligated to proceed to arbitration because the union had not attempted to exhaust the grievance procedure provided by the collective bargaining agreement before demanding arbitration. The Court rejected that argument, recognizing that questions of substance and procedure are often closely intertwined, and that a determination of whether a grievant's claim should be barred for procedural reasons often involves a

consideration of the underlying substantive dispute. The Court concluded that:

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. 376 U.S. at 557, 84 S.Ct. at 918.

As mentioned above, the underlying subject matter of the instant dispute is clearly a proper subject for arbitration. *John Wiley* suggests, then, that an arbitrator, and not this court, should hear and rule on defendant's procedural defense of laches.

Defendant attempts to distinguish *John Wiley* by pointing out that the bargaining agreement in that case was more broadly worded than that involved in the instant case; it strenuously urges that it never intended its arbitration agreement to extend to the issue of laches. What defendant fails to recognize is that its arbitration agreement *does* cover the underlying substantive dispute in this case (plaintiff's discharge) — thus whether or not the defendant also intended matters of procedure to be arbitrated is beside the point, in light of *John Wiley*'s holding that procedural questions growing out of a substantively arbitrable dispute are to be decided by the arbitrator.

A limited exception to the rule of *John Wiley* has been recognized by the Tenth Circuit, when the laches complained of involves evasive and dilatory practices in proceedings before a district court. In *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado*, 535 F.2d 598 (10th Cir. 1976), *cert. den.*, 429 U.S. 907, 97 S.Ct. 272, 50 L.Ed.2d 188 (1976), the union involved had originally claimed that it was not a party to the collective bargaining agreement at issue, later admitting to the court that it was nonetheless bound by that agreement. The court in *Reid Burton* held that the employer's agreement to arbitrate disputes involving the "application or interpretation of the terms of this agreement" [535 F.2d at 602] did not prevent a district court from considering a defense of laches based on practices before the court. Indeed, the court held that any agreement attempting to so limit the court would be outside the proper scope of a collective bargaining agreement — since courts must "maintain judicial control of their own proceedings." [535 F.2d at 603].

The laches claimed in the instant case follows from plaintiff's alleged failure to adhere to the time limits of the collective bargaining agreement rather than from any conduct before the court. The rationale of *Reid Burton* does not apply here.

III

The Tenth Circuit has consistently applied a presumption of arbitrability to a variety of labor disputes. *See Carpenters District Council v. Brady Corp.*, 513 F.2d 1 (10th Cir. 1975); *Automobile Workers v. Folding Carrier Corp.*, 422 F.2d 47 (10th Cir. 1970); and *Johnson Builders, Inc. v. United Brotherhood of Carpenters, Local 1095*, 422 F.2d 137 (10th Cir. 1970). More specifically, the Tenth Circuit following *John Wiley* has held that procedural defenses should be passed on by the arbitrator when the substance of the underlying dispute is found to be arbitrable. *See Folding Carrier Corp., supra.*

The strong national policy favoring arbitration of labor disputes is based in part on the desire to utilize the "common law of the shop" and the expertise of the arbitrator in applying that "law" to labor disputes. As *Reid Burton* recognized, that expertise is not helpful when the question of laches involves an alleged abuse of the judicial process. However, the common law of the shop is needed in the case at bar, where the issue involves interpretation of a collective bargaining agreement's grievance procedure and the effect of a union member's alleged failure to comply with the applicable time limits. An arbitrator with a ready familiarity with the operation of a plant such as defendant's is in a better position to decide these questions than is this court.

Without expressing any opinion regarding the merits of defendant's laches defense, I find that this dispute should proceed to arbitration without further delay. It is therefore

ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted and defendant's motion for summary judgment be, and the same hereby is, denied. It is further

ORDERED that defendant proceed forthwith to arbitration of plaintiff's discharge in accordance with the provisions of the 1975 Collective Bargaining Agreement between Great Western Sugar Company and Teamsters, Warehousemen and Sugar Workers Local Unions.

AUGUST TERM — AUGUST 22, 1978

Before Honorable David T. Lewis and Honorable Robert H. McWilliams, Circuit Judges.

No. 77-2047

EDWARD L. NELSON,
Plaintiff-Appellee,
v.
GREAT WESTERN SUGAR COMPANY,
Defendant-Appellant.

This matter comes on for consideration of the appellee's suggestion of mootness and motion to vacate judgment of the District Court and to remand the captioned cause with instructions to dismiss. The appellant filed a brief in response arguing that the appeal be allowed to continue but if not the judgment of the trial court should be reversed and the cause be remanded with directions to dismiss.

Upon consideration whereof, the order of the Court is as follows:

1. The appeal is dismissed on the ground of mootness.
2. The judgment of the trial court is allowed to stand.

Howard K Phillips

HOWARD K. PHILLIPS
Clerk

Supreme Court, U. S.
FILED
APR 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1060

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD L. NELSON
Plaintiff-Respondent

vs.

THE GREAT WESTERN SUGAR CO.,
a
Delaware corporation,
Defendant-Petitioner.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JOHN W. McKENDREE
Attorney for Plaintiff-Respondent
McKENDREE & LUBIN
1244 Grant Street
Denver, Colorado 80203
303-861-8906

I. QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals abuse its discretion herein by permitting the District Court's judgment to stand while simultaneously dismissing Petitioner's appeal as moot?

II. ARGUMENT

The material facts are adequately set forth in Part IV of the Petition for Writ of Certiorari.[1] The sole issue is whether the Court of Appeals abused its discretion when, in dismissing Petitioner's appeal, it refused to vacate the District Court's judgment and to remand the matter with instructions to dismiss the Complaint.

In his Suggestion of Mootness, the Respondent requested that the judgment of the District Court be vacated and that the within matter be remanded with instructions to dismiss. Such requested disposition was in accord with this Court's procedure in matters which have become moot during the appellate process. See, *e.g.*, *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 267 (1936); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Atkinson, Topeka & Santa Fe Railway Co. v. Dixie Carriers, Inc.*, 355 U.S. 179 (1957); *Parker v. Ellis*, 362 U.S. 574 (1960); *Preiser v. Newkirk*, 422 U.S. 395 (1975); see generally Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U.Chi.L.Rev. 77 (1955) [hereinafter, *Disposition of Moot Cases*]. The Respondent had obtained the sole object of his civil action, *i.e.*, arbitration of his discharge from the Petitioner's employment, and, therefore, the vacating of the District Court's judgment and dismissal of his Complaint were of no moment to him.[2]

---

[1]Respondent would note that, while his discharge was sustained on the merits in arbitration, the arbitrator found his grievance to be procedurally arbitrable. Thus, the laches defense asserted by Petitioner before the District Court was effectively rejected.

[2]The District Court had ordered, in material part, only that the Petitioner "proceed forthwith to arbitration of [Respondent's] discharge in accordance with the provisions of the 1975 Collective Bargaining Agreement between [Petitioner] and Teamsters, Warehousemen and Sugar Workers Local Unions." Petition for Writ of Certiorari at A.4.

Nonetheless, the question becomes whether, under the facts herein, the Court of Appeal's disposition warrants the discretionary review of this Court. It must initially be noted that, despite its conclusory claims, the Petitioner has shown no prejudice that it has suffered, or will suffer, from such disposition. The proceeding before the District Court was limited in scope, and there exists no possibility of an adverse effect through res judicata or collateral estoppel. Vacating the District Court's judgment would, both practically and legally, have effected only a nullity. The force of the District Court's reasoning in its opinion – which is undoubtedly the sticking point for the Petitioner, will, of course, retain its vitality irrespective of the judgment's vacation. *Disposition of Moot Cases, supra* at 93. Consequently, the underlying purpose of the *Munsingwear* doctrine, to avoid subsequent attribution of any res judicata/collateral estoppel effect to an unreversed district court judgment, was inapplicable.[3] Under substantially similar circumstances to those presented herein, the Fifth Circuit Court of Appeals in *Armendariz v. Hershey*, 413 F.2d 1006, 1008 (1969), refused to exercise its discretion and vacate a district court's judgment when a matter became moot during the appeal process, because vacating the lower court's judgment would have served no purpose.

Respondent submits that, while it may have been technically appropriate for the Court of Appeals to have followed the *Munsingwear* procedure, its disposition did not prejudice the Petitioner and was not, therefore, inconsistent with the underlying purpose of that procedure. Finally, this matter does not warrant exercise of the Court's supervisory powers, nor does it raise an important question of federal law.

[3]In *Munsingwear* the appeal determined as moot involved only one of two counts which had been before the district court; the other count remained before the district court while the appeal was being processed. After the appeal had been dismissed as moot but the district court's judgment left unaffected, the second count was dismissed by the district court on the basis of res judicata. Thus, unlike this matter, the failure of the court of appeals in *Munsingwear* to vacate the district court's judgment had a prejudicial impact.

Sup.Ct.R. 19(b). Rather, the issue sought to be reviewed is, under the facts herein, insignificant and unnecessary of consideration.

III. CONCLUSION

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

IV. COUNSEL OF RECORD

James R. Benson, Jr.
Co-Counsel for Defendant-Petitioner
6405 E. Ponderosa Drive #5
Parker, Colorado 80134
303-841-4213

Peter J. Adolph
Co-Counsel for Defendant-Petitioner
P.O. Box 5308, T.A.
Denver, Colorado 80217
303-893-4600

John W. McKendree
Counsel for Plaintiff-Respondent
McKendree & Lubin
1244 Grant Street
Denver, Colorado 80203
303-861-8906

Respectfully submitted,

By: John W. McKendree

John W. McKendree
McKENDREE & LUBIN
Counsel for Plaintiff-Respondent
1244 Grant Street
Denver, Colorado 80203
303-861-8906